No. 1500

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLUMBIA VALLEY RAILROAD COMPANY, a Corporation

APPELLANT

v.

PORTLAND & SEATTLE RAILWAY COMPANY, a Corporation

APPELLEE

On Appeal from the Order and Judgment of the United States Circuit Court for the District of Washington

Reply Brief of Appellant

W. W. COTTON
RALPH E. MOODY
For Appellant

JAMES B. KERR
For Appellee

F. W. Baltes and Company, Printers, Portland, Oregon

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Reply Brief of Appellant

Appellee questions the jurisdiction of the Circuit Court in this proceeding. It questioned it in the lower Court unsuccessfully.

It is true, as counsel for appellee states, that when this question was first suggested to Judge Hanford in this case, he held that the Circuit Court had no jurisdiction, but after the matter was fully presented to him and he gave the question consideration, he reversed his former holding and sustained the jurisdiction.

While some changes have taken place with reference to statutes regulating removals from State Courts to the Circuit Courts, the Circuit Courts have always had orig-

inal jurisdiction over cases involving federal questions, viz., cases arising under the constitution and laws of the United States, and therefore, no change in the statute on the subject of removals has modified or affected, to any extent whatsoever, the law applicable to the original jurisdiction of the Circuit Courts.

When does a case arise under the laws of the United States? This question has been answered many times by the Supreme Court of the United States, and in substantially the same language, and for the convenience of the Court, we will quote some of the statements by the Supreme Court defining such a case.

A case in law or equity consists of the right of the one party as well as the other, and may be truly said to arise under the constitution or laws of the United States whenever its correct decision depends upon the right construction of either.

Mayor v. Cooper, 6 Wall. 253;
Tenn. v. Davis, 100 U. S. 269.

The character of a case is determined by the questions involved.

Osborn v. Bank of U. S., 9 Wheat. 737-824;
Cohens v. Virginia, 6 Wheat. 264-379;
Mayor v. Cooper, *Supra;*
Gold Washing & Water Co. v. Keyes, 96 U. S. 199-201;
Tenn. v. Davis, *Supra;*
Railroad Co. v. Miss, 102 U. S. 135-140;
Ames v. Kansas, 111 U. S. 449-462;
Kansas Pac. v. Atchison R. R. Co., 112 U. S. 414-416;

Providence Sav. Co. v. Ford, 114 U. S. 635-641;
Pac. Railroad Removal Cases, 115 U. S. 1-11;
Starin v. New York, 115 U. S. 256.

"It has been frequently held by this Court that a case arises under the constitution and laws of the United States whenever the party plaintiff sets up a right to which he is entitled under such law, which the party defendant denies to him, and the correct decision of the case depends upon the construction of such law. As was said in Tenn. v. Davis, 100 U. S. 257-264: 'Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim, or protection, or defense of the party, in whole or in part, by whom they are asserted.' See also, Starin v. New York, 115 U. S. 248-257; Kansas Pac. R. R. v. Atchison, Topeka et al., R. R. Co., 112 U. S. 414; Ames v. Kansas, 111 U. S. 449-462; Railroad Co. v. Miss., 102 U. S. 135."

In re Lennon, 166 U. S. 553.

"Whether a suit is one that arises under the constitution or laws of the United States, is determined by the questions involved. If from them it appears that such title, right, privilege or remedy on which the recovery depends will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States. Osborne v. Bank of United States, 9 Wheat. 738; Starin v. New York, 115 U. S. 248-257."

Cooke v. Avery, 147 U. S. 384.

In cases where the original jurisdiction of the Circuit Court is involved, the jurisdiction is not defeated by the claim that the statute has been repeatedly construed by the United States Courts, and that therefore, the State Courts will undoubtedly properly construe the statute, for the reason that the plaintiff is entitled as a matter of right to have the proper construction placed upon the statute by the United States Court, and is not compelled to take any chances of an improper construction being placed upon it by any State Court. A federal question arises whenever a claim or right arises as the result of the application or effect of a statute, and such claim or right may be defeated by having an improper construction placed upon the statute. This principle is well stated in the following language in the case of Mayor v. Cooper, 6 Wall. 253:

"It is the right and duty of the National Government to have its constitution and laws interpreted and applied by its own judicial tribunal. In cases arising under them, properly brought before it, this Court is the final arbiter. The decisions of the Courts of the United States, within their spheres of action are as conclusive as the laws of Congress made in pursuance of the constitution; this is essential to the peace of the nation, and to the vigor and efficiency of the Government. A different principle would lead to the most mischievous consequences. The Courts of the several States might determine the same question in different ways."

This proposition, and also what is a federal question, are well illustrated in the case of Wiley v. St. Clair, 179 U. S. 58, and Swafford v. Templeton, 185 U. S. 487. In

both of these cases the plaintiff sought to recover damages on the ground that the State election officers had prevented the plaintiff from voting for members of the United States Congress. The qualification of voters, under the Constitution of the United States, are well known, and the opinion of the Court shows that the real question decided in each of the cases, was whether or not the plaintiff had complied with the State statute defining the qualifications of voters. There was no real dispute as to the terms of the constitution or the proper construction to be placed upon the constitution. Nevertheless the Supreme Court held that the plaintiffs' right to vote had its foundation in the constitution of the United States, and that having founded this right upon the constitution, the case was one arising under the constitution, and therefore, the Circuit Court had jurisdiction.

The opinion in Swafford v. Templeton, on page 494, also makes a distinction between cases based upon rights created by the constitution and laws of the United States, and which, the Court states are consequently in their essence federal, and controversies concerning rights not conferred by the constitution or laws of the United States, the contention concerning which may or may not involve a federal question depending upon what is the real issue to be decided. The distinctions thus made clearly show what all the cases have declared, viz., that whenever the right sought to be enforced by the plaintiff is one created by a law of the United States, then the case is, in its essence, federal, and the Circuit Court has undoubted jurisdiction.

Having thus attempted to show what is a federal question, the attention of the Court will now be called to this proposition, stated in the case of

Joy v. St. Louis, 201 U. S. 332,

cited by appellee, viz.:

"The mere fact that the title of the plaintiff comes from a patent, or under an act of Congress, does not show that a federal question arises."

The cases cited in support of this proposition: Blackburn v. Portland Gold Mining Co. 175 U. S. 571, and Shoshone Mining Co. v. Rutter, 177 U. S. 505, and De Lamar Nevada Co. v. Nesbitt, 177 U. S. 523.

Where a plaintiff sues on a patent from the United States the patent is conclusive as against all the world. There is no necessity, or occasion, therefore, of alleging any facts prior to the patent. The right is founded on the patent and not on any statute authorizing the issuance of the patent. If for any reason, however, the plaintiff finds it necessary to set forth facts prior to the issuance of the patent, and rests his right in part upon the statutes, then the case does present a federal question and is one which might have been commenced in the United States Court or might have been removed thereto. Of course, this rule is subject to the rule that good pleading require the plaintiff, in stating the real controversy and his real claim, to allege facts existing prior to the issuance of the patent.

An interesting case on this subject, and one directly in support of the proposition we are urging, is

Evans v. Durango Land and Coal Co., 80 Fed. 435.

In Blackburn v. Portland Gold Mining Company and other similar cases, commenced for the purpose of deter-

mining different claims to mining locations, the question presented was simply one as to the right of possession, and no right was founded by either of the parties upon any statute of the United States. These opinions clearly show that whenever any right is claimed under any particular statute, then a federal question exists and the Circuit Courts have jurisdiction. These questions are simply to the effect that a statute of the United States conferring jurisdiction upon a competent Court does not confer a right upon the plaintiff to commence his suit in the United States Court. Upon this point the Court says:

"Without undertaking to say that no cases can arise under this legislation which turn upon a disputed construction, and therefore presenting a question essentially federal in its nature, we hold that clearly where a patent is authorized to be issued to the party in possession, the statutes refer the contest to the ordinary tribunals, which are to determine the rights of the parties without any controversy as to the construction of those acts, but are to be guided by the laws, regulations and customs of the mining districts in which the lands are situated."

This point is again clearly presented in

De Lamar Gold Mining Company v. Nesbitt, 177 U. S. 528,

cited in the Joy case:

"There was undoubtedly a federal question raised in the case, but it was raised by the plaintiff Nesbitt, who based his right to recover upon the Acts of Congress of November 3, 1893, and July 18, 1894, suspending the forfeiture of mining claims for failure to do the required amount of work."

This case was one which came to the Supreme Court on appeal from a State Court, the defense taking the appeal. The Court clearly holds that if Nesbitt had seen fit to commence his action in the Circuit Court a federal question would have been presented and the Circuit Court would have had jurisdiction for the reason that Nesbitt based his right to recover, not on the local State regulations applicable to mining claims, and such possession acquired thereunder, but because of a right conferred upon Nesbitt as a result of a United States state statute.

What the Court means, and the proposition suggested in the Joy case, is further illustrated in the case of

McCune v. Essig, 199 U. S. 382.

In that case McCune made a homestead entry and died intestate, leaving as his only heirs the appellant, his daughter and his wife. The wife procured a patent to the land and conveyed the same to Essig, the appellee. The appellant commenced a suit in the State Court to establish title to the property. The appellee sought to remove the case to the Federal Court on the ground that the case was one arising under a statute of the United States, viz., the homestead laws. The appellant who commenced the suit resisted the removal and the jurisdiction of the Circuit Court was sustained. Note the following important facts:

That the case arose under the Land Laws of the United States, and patent had been issued; that the appellant commencing the suit pleaded no right under any statute of the United States, but on the contrary constantly contended throughout the whole case that the appellant inherited one-half of the property under the community

property laws of the State of Washington. The appellee sought to remove on the ground that in truth and fact the question must be determined by construction of the Homestead Laws of the United States.

Note further, that on page 389 of the opinion, the Supreme Court states that there is absolutely no doubt as to the proper construction to be placed upon the Homestead Laws, and it follows from this that there was no real controversy as to the construction to be placed upon such laws. The final result of the decision is that notwithstanding the fact that the appellant based her right on the Washington statute and always claimed that the United States statute had no application to her right, nevertheless the Supreme Court held that the cause was one arising under a statute of the United States, for the reason that such statutes covered the descent and therefore, the appellant's right to recover was in fact based upon a United States statute.

Note further, that there was absolutely no controversy as to the meaning of the United States statute, and that the whole controversy was as to whether or not the United States statute affected the title of appellant and governed and determined the rights of appellant.

This very lengthy case is a clear and positive holding to the effect that a case arises under the statutes of the United States whenever the plaintiff's rights depend upon such statutes, notwithstanding the fact that the plaintiff is insisting that the United States statutes have no application to the case. In other words, the case repeats the clear and positive declaration of the United States Court, repeatedly made, that a case arises under the laws of the

United States whenever a right, title or claim is asserted which depends upon the proper construction of the statute or the application of the statute to the facts presented. It is undoubtedly true, therefore, as stated in the Joy case, that:

"The mere fact that the title of plaintiff comes from a patent, or under an Act of Congress, does not show that a federal question arises."

But it is equally true that a title or right coming from a patent, or under an Act of Congress, does give rise to a federal question when such title or right depends upon a construction or application of an Act of Congress to the facts, and the decision in the Joy case is consistent with the previous ruling of the Court, for note the expression of the Court, at top of page 342:

"In those cases where the dispute necessarily appears in the course of properly alleging and proving the plaintiff's cause of action, the situation is entirely different."

The additional proposition asserted in the Joy case is that jurisdiction can not be conferred by the assertion in the plaintiff's pleading that the defense raises, or will raise a federal question.

This proposition we do not dispute. It is equally well established, however, that if a federal question arises as the result of logical and legal statement in the plaintiff's cause of action, such federal question cannot be eliminated by any concession on the part of defendant that there was no real and substantial controversy arising under the laws of the United States. In other words, the broad principle is that the original jurisdiction on the part of the Circuit Courts of the United States can not be made

to depend upon any defense which the defendant may or may not set up.

This principle was first stated in

Osborn v. U. S. Bank, 9 Wheat. 824,

and is repated in the following cases:

Pac. R. R. Removal Cases, 115 U. S. 23;

Tennessee v. Union & Planters' Bank, 152 U. S. 459.

In the latter case, page 459, the principle is stated in the following language:

"But 'the right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend upon that state of things when the action is brought. The question which the case involves, then, must determine its character, whether those questions be made in the cause or not.' Osborn v. Bank of United States, 9 Wheat. 738, 819, 823, 824. In this last clause, as the context shows, the word 'then' (though printed between commas) means 'at that time,' that is to say 'when the action is brought.'"

In other words, the defendant can not, by conceding the correct construction of a statute, claim that a cause does not arise under the statute. The question is that shown by the quotation made in the earlier part of this brief, viz.: "Will the right claimed by the plaintiff be defeated by one construction of the United States statute or be sustained by another?"

This principle was directly applied in the case of

Cooke v. Avery, 147 U. S. 386.

In that case the plaintiff claimed one construction of the United States statute; the defendant at the first trial of the case insisted upon another, and at the second trial conceded that the plaintiff's construction was correct, and hence argued that there was no controversy arising under the laws of the United States. The Court disposed of the contention in the following language:

"It is now insisted by defendants that the latter is the true view, and hence it is said that there is no real and substantial controversy arising under the laws of the United States. Clearly, the right of a plaintiff to sue can not depend upon the defense which a defendant may choose to set up."

The same proposition is also set up by the case of McCune v. Essig, *Supra.* In that case the plaintiff insisted that the United States Homestead Act had no application to the plaintiff's case, but that the matter was governed by the law of descent of the State of Washington.

It furthermore appears from the statement of the Court, made on page 389, that there was and could be no dispute as to the meaning of a correct construction to be placed upon the Homestead Act. The defense sought and obtained a removal on the ground that in truth the facts alleged by the plaintiff showed that the plaintiff's right depended upon the construction of the Homestead Act.

It will be further noted that no reference was made in the plaintiff's complaint to the particular section which the Supreme Court afterwards held to be applicable to the facts. The Court held that the facts alleged showed that the plaintiff's rights depended upon the correct con-

struction of the Homestead Laws, and that therefore, the case was one arising under the Homestead Laws, notwithstanding plaintiff was insisting that such Homestead Laws had no application to the facts, and notwithstanding that there was no dispute as to the proper construction to be placed upon the Homestead Laws. The Supreme Court held that the Circuit Court had jurisdiction for the reason that the case was one arising under the laws of the United States. The result of these cases which we have examined in connection with the Joy case clearly establish the proposition that a federal question exists wherever the right or title claimed by the plaintiff may be defeated by one construction of a statute of the United States, or may be sustained by another, and that as long as such question properly appears by the pleadings of plaintiff, the federal question cannot be inserted by anticipating any defense of defendant and it can not be eliminated by any claim of plaintiff that the statute has no application to his right, or by any concession on the part of defendant that the statute applies but that there is no doubt about its construction and that the federal question exists, notwithstanding the fact that no real controversy exists as to the proper construction of the statute. Wherever the right of plaintiff depends upon a federal statute the plaintiff has the right to commence his suit in the Circuit Court for the purpose of obtaining a correct construction of the statute, or the defendant has a right to have the case removed to the Circuit Court for the purpose of obtaining a like construction. The sole and only question to be considered in every case is that the federal question must appear by a statement of facts made by the plaintiff, and

where such question does appear, then the Circuit Court has original jurisdiction.

Appellee refers to the case of

Gold Washing & Water Co. v. Keyes, 96 U. S. 199, a case frequently referred to and cited with approval in the Supreme Court in connection with cases similar to the one presented in this case. In fact reference to the Gold Washing case was made in the Joy case, the last utterance of the Supreme Court on this subject, and such reference is made upon the point as to what constituted good pleading in a case where a claim of right is made under a statute. By referring to page 202 and page 203 of the opinion in the Gold Washing case, it will be noted that the defendants claim a right to use the channel of a river under the provisions of a certain specified Act of Congress. Such allegations would be the equivalent of an allegation in the present case that the complainants were owners of rights of ways over public lands of the United States, under and by virtue of the Act of March 3d, 1875. To so plead is not to state facts but conclusions of law. Upon this subject the Court says, in the Gold Washing case, page 203:

"Certainly, an answer or plea, containing only the statements of the petition, would not be sufficient for the presentation of a defense to the action under the provisions of the statutes relied upon. The immunities of the statutes are, in effect, conclusions of law from the existence of particular facts. Protection is not afforded to all under all circumstances. In pleading the statute, therefore, the facts must be stated which call it into operation. The averment that it is in operation will not be enough; for

this is the precise question the Court is called upon to determine."

In the present case the complainant in pleading the statutes, stated the facts which call the statutes into operation. The complainant bases its right entirely upon the statute, and in its effort to plead the facts, bringing itself within the statute, the complainant shows that its location was made and its maps were filed and approved more than five years prior to the commencement of the suit, and it is upon these facts that the defendant denies the right of complainant and insists that the true construction of the Act of March 3d, 1875, applied to the facts so alleged, shows that the complainant's suit is without merit.

The question so presented is not a defense to the defendant, anticipated by the complainant, but it is a possible infirmity of the complainant's cause of action appearing as the necessary result of its statement of facts.

In addition, the allegation is made that the defendant claims a right in the lands to which the right of way of complainant attaches, and is disputing the right of complainant to build its railroad and that its rights are paramount to those of complainant; it has entered upon a portion of the right of way of complainant, is making excavations and fills thereon and is threatening to enter upon that portion of the right of way in possession of complainant and upon which complainant is now and has been constructing its railroad and threatens to destroy the grade so constructed and disputes the right of complainant to its right of way, on the ground that more than five years have elapsed since the location of complainant's right of way.

Under all the authorities, this Court has undoubted jurisdiction to decide the federal question on which the complainant's rights depend, viz., does the Act of March 3d, 1875, grant an estate prior to the construction which can only be divested by proper act on the part of the United States, or does such grant prior to construction simply make an offer which ceases without any act on the part of the United States, at the expiration of five years after location?

The complainant has no title by patent or any other written instrument executed by any officer of the United States Government, therefore, in order to claim the right of way the complainant must plead the statute and then must plead the facts to show that complainant has performed the acts necessary to bring it within the statute.

The Act of 1875 applies to public lands. In order to logically state the case the complainant must allege that the lands claimed were public lands and it must allege the facts which show that complainant has taken all the steps necessary, under the Acts of Congress, to obtain such right of way. As was said in the Gold Washing case:

"The office of pleading is to state facts, not conclusions of law. It is the duty of the Court to declare the conclusions, and of the parties to state the premises."

In this case complainant has no written grant, such as a patent from the United States, for the right of way claimed by it; it claims such right of way under an Act of Congress and by virtue of certain acts and things done by it in order to comply with such acts, and the proper pleading therefore, requires that all the acts and things

done by it in order to comply with the act shall be alleged as facts.

Complainant has undertaken to allege such facts, and its right, title and claim sought to be enforced in this suit, depend upon the construction placed upon the Act of Congress when applied to such facts. This is very easily seen by a comparison of the bill with the act itself, and we therefore insist that appellee's contention that the Circuit Court was originally without jurisdiction is without merit.

All of the contentions of appellee, as to the nature and character of the grant made by the Act of March 3d, 1875, are clearly disposed of by the following quotation from

Noble v. Union River Logging R. R., 147 U. S. 172,

wherein it is said:

"At the time the documents required by the Act of 1875 were laid before Mr. Vilas, then Secretary of the Interior, it became his duty to examine them, and to determine, among other things, whether the railroad authorized by the articles of incorporation was such an one as was contemplated by the Act of Congress. Upon being satisfied of this fact, and that all other requirements of the act had been observed, he was authorized to approve the profile of the road, and to cause such approval to be noted upon the plats in the land office for the district where such land was located. When this was done, the granting section of the act became operative, and vested in the railroad company a right of way through the public lands to the extent of 100 feet on each side of the central line of the road. Frasher v. O'Connor, 115 U. S. 102."

And the decision of the Supreme Court in the case of New Mexico v. United States Trust Co., 172 U. S. 171,

wherein the Court was determining whether a grant of a right of way under the act similar to the Act of 1875 was a grant in fee or a mere easement, in which case the Supreme Court held that such a grant was a grant in fee, it also makes the following observations, page 183:

"But if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted, one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property."

Appelle now for the first time contends, that by virtue of the Act of June 26, 1906, which act is set out in full in appellee's brief, Congress has forfeited the right of way obtained by complainant, and while appellee admits that the original bill of complainant was filed February 2d, 1906, several months prior to the passage of the Act of June 26, 1906, and that the second amended bill was filed September 17th, 1906, that nevertheless the said Act of June 26th may be considered by the Court in this case, and appellee further insists, that even though the forfeiture act by its terms expressly provides:

"That in any case under this act where construction of a railroad is progressing in good faith at the date of the approval of the act, the forfeiture declared in this act shall not take effect as to such line of railroad," that the following allegations of complainant's second amended bill, "is now and has been for some time prior hereto, actually and actively engaged in the building and con-

struction of a grade for its railroad, therefore and thereon," is not an allegation that the complainant was on the date of approval of the Act of June 26, 1906, progressing in good faith in the construction of its railroad upon its said right of way.

In the first place, the Act of June 26, 1906, is not and can not be involved in this suit, as this suit was commenced some months prior to its enactment.

The case of

> United States v. Winona & St. Peter Ry. Co., 165 U. S. 463-476,

cited by appellee as supporting its contention that the said forfeiture act can now be considered in the decision of this case, is inapplicable and fails to support such contention as an examination of the decision will show. This case was one in which the Attorney-General of the United States, in obedience to a command of Congress, had instituted a suit in the name of the United States to cancel certain patents, and after the decision had been rendered by the Circuit Court and the Court of Appeals, and prior to the decision of the Supreme Court, Congress passed an act confirming the title to the property theretofore conveyed to the State. The Court, therefore, held that as Congress had directed the institution of the suit, it had a right, prior to the final decree, to direct the withdrawal. We quote a portion of the opinion, pages 476, 477:

"But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed. It is true this act was passed after the commencement of this suit—indeed,

after the decision of the Court of Appeals—but it is none the less an act to be considered. There can be no question of the power of Congress to terminate, by appropriate legislation, any suit brought to assert simply the rights of the Government. This suit was instituted by the Attorney General in obedience to the direct command of Congress, as expressed in the Act of 1887, and Congress could at any time prior to the final decree in this Court direct the withdrawal of such suit; and it accomplishes practically the same result when, by legislation within the unquestioned scope of its powers, it confirms in the defendants the title to the property which it was the purpose of the suit to recover. So, if this Act of 1896, taken by itself alone, or in conjunction with preceding legislation, operates to confirm the title apparently conveyed by the certification to the State for the benefit of the railroad company, that necessarily terminates this suit adversely to the Government, and compels an affirmance of the decisions of the lower courts without the necessity of any inquiry into the reasons advanced by those courts for their conclusions."

Complainant's title to the property is to be determined by the acts in force at the time of the commencement of its suit.

McCool v. Smith, 1 Black. 459-471.

The allegations of complainant's bill show that it was progressing in good faith on the 26th of June, 1906, in the construction of its railroad upon the said right of way, and that therefore the forfeiture act did not take effect as to complainant's line of railroad.

Complainant instituted this suit on February 2d, 1906 (Transcript page 23), and complainant alleges in paragraph 12 of its original bill:

"That all the steps taken as aforesaid by the plaintiff were taken in good faith for the purpose of constructing a railroad along the route described in its article of incorporation, and the plaintiff at all times since its incorporation has been and is now actively engaged in prosecuting the said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point near the mouth of the Columbia River, for the carriage of freight and passengers in accordance with its articles of incorporation, and is in all respects conforming to, and intends to conform to, the provisions of said Act of Congress, hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad." (Transcript, pp. 18 and 19.)

And again in its first amended complaint, complainant alleges in its 12th paragraph, as follows:

"That all the said steps taken as aforesaid by the plaintiff were taken in good faith for the purpose of constructing a railroad along the route described in its articles of incorporation, and the plaintiff at all time since its incorporation has been and now is actively engaged in prosecuting said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point opposite Wallula to a point near the mouth of the Columbia River for carriage of freight and passen-

gers in accordance with its articles of incorporation, and is in all respects conforming to and intends to conform to the provisions of the said Act of Congress hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad." (Transcript, page 45.)

And again complainant alleges, in its second amended bill, in its 12th and 13th paragraphs, as follows:

"And your orator further shows that all the said steps taken as aforesaid by your orator were taken in good faith for the purpose of constructing a railroad along the route described in its articles of incorporation, and your orator at all times since its incorporation has been and now is actively engaged in prosecuting the said enterprise, and desires and intends to construct with reasonable dispatch, and operate a railroad over said line described in its articles of incorporation, from a point opposite Wallula to a point near the mouth of the Columbia River for the carriage of freight and passengers in accordance with its articles of incorporation, and is in all respects conforming to and intends to conform to the provisions of the said Act of Congress hereinbefore referred to, and the regulations of the said Secretary of the Interior relative to survey, location and construction of its said railroad.

"And your orator further shows that it was at the time of the institution of this suit and it is now in actual possession of its right of way over the said public land hereinbefore described, as it traverses Lot 1, Section 35; Lots 1 and 2, Section 33, and Lots 2 and 3, in Section 32, all in Township 3, north of Range 9, east of the Willamette Meridian, and Lot 4, Section 35, Township 3, north of

Range 8, east of the Willamette Meridian, and is now and has been for some time prior hereto actually and actively engaged in the building and construction of a grade for its railroad therefor and thereon, and is now expending and has heretofore expended large sums of money in and for said construction, and has completed the grade upon some portion thereof." (Transcript, pp. 113 and 114.)

Therefore, admitting only for the purpose of argument, that the Court may consider in this case the Act of June 26, 1906, it appears from the allegation of the bill that complainant was engaged in the construction of its railroad and progressing in good faith at the date of approval of the act, and therefore, under the terms of the act forfeiture did not take effect as to complainant's line of railroad.

We state that this appears from the allegation of the bill, because the rule is general in all courts of equity that an original and amended bill are to be regarded simply as one entire bill, constituting in fact but one record. An amended bill is, in fact, a continuation of the original bill and forms a part of it, and the original and amended bills constitute but one pleading and but one record. And so far as the equity of the bill is involved the amended bill has relation to the commencement of the suit by the filing of the original bill. That such is the rule in equity appears beyond question by the following citations:

"An amended bill is in fact, a continuation of the original bill and forms a part of it, and the original and amended bills constitute but one pleading and but one

record; so much so that, when an original bill is fully answered and amendments are afterwards made to which defendant does not answer, the whole record may be taken *pro confesso* generally."

Bates on Federal Equity Procedure, Sec. 140.

"All amendments to the original bill are always considered as incorporated in it, and form a part of it."

Bates on Federal Equity, *Supra.*

"An amended bill is esteemed a part of the original bill and a continuation of the suit. But one record is made."

French, Trustee, v. Hay et al., 22 Wall. 238-246.

"The rule is general in all courts of equity, that an original and an amended bill are to be regarded simply as an entire bill, constituting in fact, but one record so far as the equity of the bill is involved. The amended bill has relation to the commencement of the suit by the filing of the original bill."

Adams v. Phillips, 75 Ala. 461;

Lipscomb v. McClellan, 72 Ala. 151.

"The amended bill becomes part and parcel of the original bill. The original bill and amended bill constitutes but one record. Amendments refer generally to the time of filing the original bill."

Corey v. Hillhouse, 5 Ga. 251;

Munch v. Shabel, 37 Mich. 166.

"That the amendment was properly allowed, was determined by this Court at a former term. And the allegations introduced by amendments are now to be taken as

part of the original bill and to have the same effect, in the ultimate determination of the cause, as if they had been originally inserted."

Hoyt et al., v. Smith et al., 28 Conn. 466-471.

"The reason of the rule is that amendments, when allowed, are always considered as incorporated in and as forming part of the original bill; the amendments in the original bill, constitute one record; the amendments, in contemplation of law, bear the same date as the original bill, and relate to facts which existed when the original bill was filed."

"Bates on Federal Equity Procedure, Sec. 150.

"An amendment therefore, speaks as of the date of the original bill; and an amendment alleging the requisite difference of citizenship in the present time is sufficient to establish the jurisdiction of the Court."

Foster's Federal Practice, Second Edition, Vol. 1, Sec. 164;

Birdsall v. Perego, 5 Blatchf. 251;

Fisher v. Moog, et al., 39 Fed. 665.

"Amendments to a bill have the same effect in the ultimate determination of the cause as if they had been originally inserted. When properly allowed they take effect as of the date of filing of the original bill."

Beech Modern Equity Practice, Vol 1, Sec. 154, 16 Cyc. 350;

Enc. of Pleading and Practice, Vol. 1, 491.

"An amended complaint speaks from the date of filing of the original complaint."

Kirkham et al. v. Moore, et al. (Ind.), 65 N. E. 1040;

Ferguson et al. v. Morrison et al. (Tex.), 81 S. W. 1240.

"For the purpose of determining the plaintiff's right of action, the complaint as amended is to receive the same consideration as if the matter alleged in the amended bill had been included in the bill when originally filed."

White v. Stevenson et al. (Cal.), 77 Pac. 828.

In view of the foregoing references, there can be no question but what the bill alleges a sufficient state of facts to show that the forfeiture act of June 26, 1906, does not apply to the complainant's line of road, and if the allegations contained in paragraphs 12 and 13 of complainant's second amended bill stood alone they are of themselves a sufficient allegation to show that complainant was engaged in good faith in the construction of its road at the date of the approval of the forfeiture act. And particularly is this so, as against a general demurrer where all intendments and presumptions exist in favor of the bill.

While appellant insists that the forfeiture act is not before the Court in this proceeding, and that if it is the allegations of the bill are such as to show that such act, under its terms, has no application to the complainant's line of railroad, we might add, however, that the act itself is not sufficient to declare and enforce a forfeiture. By the common law and the civil law the King can not take

upon himself the possession of an estate until judicially ascertained by a procedure in the nature inquest of office.

Chase's Blackstone, 750.

An inquest of office is the remedy in the United States applicable to cases where property is forfeited to the State.

People v. Folsom, 5 Cal. 377;
Reid v. Starr, 75 Ind. 252;
Wilbur v. Toby, 33 Mass. (16 Pick.) 177;
Jackson v. Adams, 7 Wend. 367 (N. Y.);
Crawford v. Commonwealth, 1 Watts (Pa.) 480;
Marshall v. Lovelace, Conf. R. (N. C.) 217.

And this rule has been recognized and adopted by the United States Supreme Court in cases involving the question of forfeiture of land to the Government.

Fairfax v. Hunter, 7 Cranch 603;
Smith v. Maryland, 6 Cranch 286.

"Before a forfeiture or reunion with the public domain could take place, a judicial inquiry should be instituted, or in the technical language of the common law, office found, or its legal equivalent. A legislative act directing the possession and acquirement of the land is equivalent to office found." U.S. v. Repentigny - 5 Wall. 211-267-8

It is true that the United States Supreme Court, upon several occasions held that the acts of Congress in the cases then before them, were sufficient and took the place of a suit, and were equivalent to a judicial proceeding. But in each of the cases, as an examination of them will show, the act was positive and free from doubt or ambig-

uity, left no facts to be ascertained; forfeiture was asserted and enforced unconditionally. The lands forfeited could be easily and at once identified by the acts, while under the Act of June 26, 1906, it is provided that the forfeiture shall only be enforced where a railroad has not been constructed within the five years following the location of the said road, or where the construction of the railroad was not progressing in good faith at the date of approval of the act, leaving two important questions to be decided before the forfeiture is to take effect.

"Legislation to be sufficient must manifest an intention by Congress itself to reassert title and resume possession. As it is to take the place of a suit by the United States to enforce a forfeiture, and a judgment therein establishing the right, it should be direct, positive and free from doubt or ambiguity."

St. Louis & Iron Mt. Ry. Co. v. McGee, 115 U. S. 469.

As the sufficiency of the act must be governed by the same rule that determines the sufficiency of a judgment, it is apparent that the Act of June 26, 1906, is not of itself sufficient, without judicial procedure to declare and enforce the forfeiture therein provided for.

It is to be remembered that if there is a breach of the conditions subsequent in a grant before the Government could institute proceedings having for its purpose the forfeiture of the grant by reason of the breach, there must be legislative authority authorizing proceedings to enforce forfeiture.

"The mode of asserting or assuming the forfeited grant is subject to the legislative authority of the Government."

U. S. v. ~~Hiplinger~~ Reprinting, ~~5~~ Wall. ~~286~~. 211-268.

In the case of the

United States v. Northern Pacific Ry. Co. 177 U. S. 435,

which was a proceeding instituted by the Government seeking a forfeiture of a grant by reason of a breach of conditions subsequent, the Court held as the bill did not allege that it was brought under the authority of Congress for the purpose of enforcing a forfeiture, and did not allege any other legislative act looking to such an intention, that it was plain, under the authorities, that the bill could not be regarded as having for its purpose the enforcement of a forfeiture. Therefore, the legal effect of the Act of June 26, 1906, and its sole purpose is the authority upon which the Government could institute an inquiry to ascertain whether a railroad company claiming land under the Act of March 3, 1875, has constructed within the period of five years next following the location of the road, or that construction was progressing in good faith at the date of approval of such act. If either of these facts exists such land could not be declared forfeited. This inquiry must be a judicial one in which the parties would be entitled under the authorities hereinbefore referred to, to a trial, at which trial the facts are to be submitted to and determined by a jury.

As it is admitted that the Government has not instituted any such proceeding, the title to the land acquired under the Act of March 3d, 1875, remains unimpaired in the grantee and will remain in it until the Government

in such proceeding can show that the lands are such lands as are to be declared forfeited and restored to the public domain under the Act of June 26, 1906.

Since the Government has not instituted any such proceeding it becomes immaterial, so far as this case is concerned, whether any facts exist that would be sufficient to authorize a judgment of forfeiture in a proper proceeding, for that matter is of no concern to the appellee; under the authorities referred to in appellant's opening brief it is plain that it cannot question appellant's title by attempting to allege that appellant has committed a breach of condition subsequent as appellee is a stranger to such condition.

In view of the foregoing considerations this cause should be reversed and the lower court directed to issue the injunction prayed for.

Respectfully submitted,

W. W. COTTON,
RALPH E. MOODY,
Solicitors for Appellant.